UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re	
HARLINDA CORPORATION, **dba Missoula Athletic Club,**	Case No. **04-61737-11**
Debtor.	
HAROLD RICHARD DENNISON **LINDA RAE DENNISON**	Case No. **04-61738-11**
Debtors.	

MEMORANDUM OF DECISION

At Butte in said District this 11th day of April, 2005.

In these jointly administered Chapter 11 cases, a hearing was held at Missoula after due notice on March 10, 2005, on confirmation of the Debtors-in-Possession's ("DIP") Amended Chapter 11 Plan, filed January 26, 2005. Secured creditor Amresco Commercial Finance ("Amresco") filed an objection to confirmation on March 8, 2005, and was represented at the hearing by attorney Jon R. Binney ("Binney"). The DIP were represented by attorney Harold V. Dye ("Dye"), and Debtor Harold Richard Dennison ("Harold") testified. Also testifying were the estate's real estate broker Ed Coffman ("Coffman") of Lambros Real Estate ("Lambros"), and Amresco's senior asset manager Jim Balis ("Balis"). Amresco's Exhibits ("Ex.") A through X, and DIP's Ex. 1 consisting of Coffman's recast financial statements of the DIP's principal asset, the Missoula Athletic Club ("MAC"), all were admitted into evidence by stipulation. At the

conclusion of the parties' cases-in-chief the Court closed the record and took the matter of confirmation under advisement.

This Court has jurisdiction over these jointly administered Chapter 11 cases under 11 U.S.C. § 1334(a). Confirmation of DIP's Chapter 11 Plan is a core proceeding under 28 U.S.C. § 157(b)(2)(L). At issue is whether the DIP have satisfied the requirements for confirmation of their Amended Plan under 11 U.S.C. § 1129.

FACTS

Harold testified that he was a certified public accountant ("CPA") for years, and owned his own CPA firm in Seattle for 10 years until he moved to Montana in December 1997. Harold is the president of Harlinda, which was named by combining Harold and Linda Dennison's names when they incorporated Harlinda on November 24, 1997, for the purpose of acquiring and operating the MAC. He testified Harlinda utilizes the accrual method of accounting.

MAC is a full service health and fitness facility located on the north bank of the Clark Fork River on the east end of Missoula, Montana. Ex. N, Disclosure Statement, p. 4. The MAC includes court facilities for tennis, racquetball, as well as weight rooms, a domed tennis facility, and a separate indoor rock climbing facility – the Missoula Rock Garden – which they added in 1999. Ex. N, p. 4. Harlinda purchased the MAC in 1997 from a party named Dick Doyle ("Doyle").

Initially Doyle self-financed the sale of MAC to Harlinda. When Harlinda decided to add the Missoula Rock Garden in 1999 it attempted to finance construction with a $1 million SBA loan administered by First Security Bank. Harold testified that First Security Bank agreed to finance construction so they began construction, but when Doyle refused their request to

subordinate his loan to First Security Bank's construction loan, First Security Bank backed out and refused to close the construction loan even though construction had begun.

Harold testified that he was contacted by Amresco, with whom he and Harlinda negotiated a consolidation of all of Harlinda's loans. Balis is Amresco's senior asset manager and he has serviced defaulted secured loans for Amresco since 1989. Balis explained that Amresco originally made loans itself, but now Amresco just services secured loans for other lenders and is paid for its services by a spread. Balis testified that Amresco is different from other lenders in that it deals in non-asset based lending based upon cash flow rather than real estate value. Amresco is a securitized lender, which Balis explained has a credit line with financial institutions. Amresco's loans are pooled and sold as bonds to entities such as teachers unions, life insurance companies and retirees. Balis testified that all of Amresco's defaulted health club loans are serviced by his department, and 2 of those loans are presently in bankruptcy.

Harold and Linda, as Harlinda's officers, signed a promissory note, Ex. A, dated May 28, 1999[1], borrowing from Amresco the aggregate amount of $2,511,111.11, which Harold testified was used to pay off First Security Bank and Doyle. The interest rate on Ex. A, Harold testified, was nine and one-half percent, and regular payments were automatically withdrawn from Harlinda's checking account. Harold also executed a mortgage, Ex. B, and he and Linda signed on behalf of Harlinda mortgage and security agreements, Ex. B and C, pledging Harlinda's real and personal property assets, including accounts, equipment, and intangibles, to secure repayment of the loan on Ex. A to Amresco, dated May 28, 1999. Ex. A, B, and C all provide

[1]The notarization for Dennisons' signatures is dated May 25, 1999, but the first page of Ex. A shows a May 28, 1999, date.

that Idaho law shall be governing law. Ex. B, the mortgage, was duly recorded on June 3, 1999. Amresco filed a financing statement on June 14, 1999, signed by Harold, with the Montana Secretary of State. Harold and Linda executed an "Affiliate Guaranty (Personal)" for Harlinda's loan from Amresco dated May 28, 1999. Ex. D.

Amresco assigned its interest in the Harlinda mortgage to Norwest Bank Minnesota, National Association. Ex. F is the assignment. The Court notes that Ex. F shows May 26, 1999, as the date on which Amresco's vice president Dale Conder signed Ex. F, and it was witnessed and notarized with the date of May 26, 1999, even though Ex. F refers to agreements with Harlinda dated two days later on May 28, 1999, and even the recording date of the Harlinda mortgage, June 3, 1999.

Harold and other family members went to work at the MAC. He testified that he and Linda take a $6,000 monthly draw, and have never taken out more. In addition, Harlinda pays a $600 per month premium for an ongoing life insurance policy from Philadelphia Insurance Co. Harold testified that he does not use any MAC money to pay personal debt except through his monthly draws, with the exception that based on his attorney's advice Harlinda paid Harold's personal credit card debt for charges used for Harlinda's business.

Harold admitted that the DIP have purchased new equipment for the MAC worth between $2,000 to $4,000. In January 2004 Harlinda asked Amresco's permission to use $6,000 held in reserve to purchase new spin cycles, but Harold testified that he learned that Amresco had confiscated $8,000 from their reserve account.

Harold testified that he was not aware that any of Harlinda's automatic withdrawal payments to Amresco "bounced". He testified that he asked Amresco several times to change the

payment date on its loan to the 8th day of the month to accommodate MAC's cash flow, but that Amresco refused. Harold admitted that several payments to Amresco were made late. Ex. V is Harlinda's loan payment history and shows payments from 6-29-99 through 2-11-04. Ex. V shows several instances where monthly payments were reversed or backed out, or partial payments made.

Harlinda's loans were transferred to Balis' department for servicing. Amresco sent Harlinda notices of default dated July 8, 2002, based upon a missed July 1, 2002, payment, Ex. H. Balis testified that default was ultimately cured. A second notice of default, Ex. I dated November 10, 2003, was sent by Amresco to Harlinda, Harold and Linda based upon unpaid real property taxes. Harold testified that he assumed real estate taxes for 2001, 2002, and 2003 were not paid, and the 2004 taxes were not paid on advice of counsel because of the bankruptcy filing. Based on the failure to pay real property taxes, Amresco accelerated the loan by Ex. J, a letter dated November 26, 2003. Ex. J states the amount due as $3,115,527.19 consisting of $2,028,844.77 principal, $795,826.92 described as "Make Whole Premium", $253,099.07 in "Credit Enhancement Amount", and $37,756.43 in interest and late fees. Harold admitted that Amreco's loan documents allow for a 12.5% interest rate in event of default.

Amresco sued for enforcement under the note. After Amresco obtained a default against Harlinda, on April 6, 2004, the United States District Court for the District of Idaho awarded Amresco attorney's fees in the sum of $8,339.50 and costs of $197.25. Ex. L.

Harold tried to refinance Amresco's debt through Business Loan Express, which sent Harold a financing proposal dated April 30, 2002, for a loan he testified was in the amount of $2,500,000 loan repayable at an interest rate of 7%. Ex. W, p. 1. Harold testified that Amresco

would have been paid its principal plus $214,0000. He testified that, in anticipation of the refinancing, Amresco told him not to make the June 2004 loan payment. But that deal fell through, and Harold testified that incident forms one basis for the DIP's claim they plan to assert against Amresco. Ex. O, 3rd page[2]. Harold testified that another refinancing proposal for a loan of $2,750,000 from Nations Commercial Capital, Ex. W, p. 2, in June of 2002 was not pursued because that lender wanted a $35,000 unrefundable processing fee immediately and the term of 7 years was too short.

In addition to attempting to refinance, Harold testified that he listed the MAC for sale for approximately 17 months, but that their first realtor Bill McQuirk ("McQuirk") of Lambros Real Estate ("Lambros") did not begin advertising the property for the first several months, and the MAC has really been on the market for only 12 or 13 months. Balis testified that he knew of McQuirk's marketing efforts, and that McQuirk had marketed the MAC heavily on his own website, a fitness center website, national publications and newspapers in Missoula, Los Angeles, and Seattle.

The original listing price was $5.2 million, later reduced. Harold testified that he relied on McQuirk's expertise in setting the original $5.2 million listing price even though he thought it was high. Harold testified that an appraisal on the MAC's land and buildings provided a value of $3.6 million, and that MAC's equipment is worth another $800,000. Balis testified that MAC's equipment would be worth less than $50,000 if it were liquidated, but he did not offer a written appraisal of MAC's equipment.

Both Chapter 11 petitions were filed on June 4, 2004. From February 4, 2004, to the

[2]Ex. O, DIP's Supplement to Disclosure Statement, is not paginated.

petition date, Balis testified that Harlinda paid Amresco 2 payments of approximately $15,000 and one payment of $8,000. Harlinda's Schedules were filed on June 23, 2004. Schedule A lists MAC's real property at a current market value of $3,677,000. Ex. R. Schedule B lists $862,500 total value for Harlinda's personal property, including $20,000 in its checking account, equipment valued at $650,000 and the tennis dome valued at $100,000. Ex. R.

In Harlinda's Schedule D, Amresco is listed as having a secured claim in the amount of $2,018,087.99, secured by property with a market value listed of $4,329,500. Ex. R. The Missoula County Treasurer is listed on Schedule D as having a claim in the amount of $118,983.25 secured by a tax lien. Harlinda's Schedule F lists $83,774.16 in unsecured claims, mostly personal property taxes and credit card debt.

Dennisons listed their home on Schedule A with a value of $385,000, encumbered by two (2) mortgages in the amounts of $254,035.00 and $65,000.00. Dennisons' Schedule F lists $3,687,011.23 in unsecured debt, almost all of which is based on their personal guarantee of Harlinda's debts to Amresco ($2,018.87.09) and Yeadon Fabric ($1,646,600). Schedule I lists Harold's income as $6,000 per month from Harlinda, plus $100 interest income.

These two Chapter 11 cases were jointly administered upon Debtors' motion by Order entered on July 6, 2004, without objection.

Amresco filed motions for adequate protection and to prohibit the use of cash collateral by Harlinda on June 11, 2004. Those motions were resolved by Stipulation filed and approved on August 16, 2004. That Stipulation provided that Harlinda would make monthly adequate protection payments to Amresco in the amount of $15,957, maintain insurance on Amresco's

collateral and provide financial information[3], in return for the right to use cash collateral and operate the MAC. Balis testified that he received from Harlinda some but not all of the financial information required under the Stipulation, including balance sheet, profit and loss and cash flow statements. Harold testified that the DIP currently pays Amresco at the contract rate of interest of nine and one-half per annum during the pendency of these Chapter 11 cases until confirmation. He admitted that he has not provided Amresco with all required financial information because his latest reports for November and December of 2004 were not complete, but he testified that he will finish them and send them to Amresco.

The DIP employed McQuirk to market the MAC by application filed July 21, 2004. The listing agreement with McQuirk is first dated October 9, 2003, for a period of one (1) year, Ex. K. Ex. K provides for a listing price of $5,200,000 and a commission of four percent (4%) at closing, unless McQuirk acts as both buyer's agent and seller's agent, in which event the commission is 3%. Ex. K was modified to extend the term, change the listing from office exclusive to open listing, and lastly to reduce the price to $4,200,000. Ex. K.

The DIP filed a Chapter 11 Plan of reorganization and Disclosure Statement (Ex. N) in December 2004, and filed an amended Plan (Ex. M) and a supplement to Disclosure Statement (Ex. O) on January 26, 2005, after objections were filed. Ex. N lists the value of MAC's equipment at $650,000, while Ex. O's balance sheet lists MAC's equipment at $642,000 and the rock climbing equipment at another $21,441.26. Harold testified that he valued MAC's equipment for liquidation purposes by taking fifty percent of the advertised price for comparable

[3]Amresco has filed a motion and an amended motion to prohibit use of cash collateral alleging DIP's failure to provide financial information. That amended motion is pending, with the response time expiring on April 7, 2005.

equipment. The amended disclosure statement was approved by Order entered February 11, 2005, without opposition.

DIP's amended Plan lists Amresco in Class 3.1 as a creditor secured by the MAC's assets under a deed of trust and security agreement. Ex. M. Class 3.4 consists of Yeadon Fabrics, secured by a purchase money security interest in the MAC's tennis bubble. Class 5.1 are jointly owed unsecured claims or claims owed solely by Harlinda. Class 5.2 are unsecured claims owed by Dennisons. Yeadon and Amresco both are impaired.

Article III of the amended Plan provides for payment of claims. Amresco and Yeadon will retain their liens until paid in full, and the amended Plan provides at pages 3-4 that Amresco and Yeadon will be paid interest on their allowed claims on a monthly basis at six percent (6%) per annum. Ex. M. At page 4 the amended Plan states: "The allowed claims of Class 3 claims will be paid in full no later than three years after the effective date from the sale" of the MAC. Ongoing interest payments to Amresco are to be funded by Harlinda's operating income during the 3 year plan term. Ex. M, p. 4.

Amresco filed Proof of Claim No. 3 on October 8, 2004, asserting a secured claim in the amount of $3,078,421.14. Ex. N. The DIP filed an objection, as a result of which Amresco filed an amended Proof of Claim No. 6 on February 4, 2005, Ex. Q, reducing its secured claim to $3,070,980.86, as a result of which the Court overruled DIP's objection to Proof of Claim No. 3 as moot. DIP's supplemented Disclosure Statement, Ex. N 6th page and Ex. O, 3rd page, both provide that the DIP may raise further objections to Amresco's Proof of Claim with the aim to reduce it. Ex. O states on the third page:

> It is true that if Amresco's secured claim is allowed at its face value

($3,078,421) it would be unlikely that all creditors could be paid in full. Debtors do not believe that the claim will be so allowed, however.

Amresco's proof of claim incorrectly states the principal balance due is as of the commencement of the case is $3,078,421 and that it is owed no amounts other than t [sic] the principal amount of the claim. In fact, the true principal balance is approximately $2,018,088 with the balance made up of "make whole" charges which Debtors doe [sic] not belief [sic] are allowable. The Debtors intent to immediately object to Amresco's proof of claim to establish the correct principal balance and to argue that Amresco waived its right to claim sums greater than the principal balance by not showing them on the proof. If this is unsuccessful Debtors intend to object to the additional charges on substantive grounds.

DIP's amended Plan provides for retention of jurisdiction by this Court "to hear and determine claims against Debtor and to enforce causes of action which may exist on behalf of Debtor." Ex. M, pp. 4-5.

Yeadon filed Proof of Claim No. 4 on October 12, 2004, asserting a secured claim in the amount of $170,816.91 secured by a tennis dome and related fixtures and equipment. Harold testified that the DIP reached a settlement with Yeadon fixing its allowed secured claim at $140,000, which was approved by Order entered March 2, 2005.

Missoula County filed Proof of Claim No. 5 on December 20, 2004, asserting a priority claim in the amount of $244,103.12. Harold testified that claim is excessive and they may dispute that claim under the Plan provision to determine claims. The Internal Revenue Service filed Proofs of Claim including a secured claim in the amount of $195,772.42[4]. Ex. O, 2nd page, explains the IRS's secured claim is for unpaid trust fund liability for unpaid payroll taxes. Dennisons may be jointly liable with Harlinda to the IRS as corporate officers for unpaid trust

[4]IRS's Proof of Claim No. 2 filed September 2, 2004, amends Proof of Claim No. 1. Proof of Claim No. 2 includes an unsecured claim of $1,668.51, a secured claim of $195,772.42 and a priority claim of $22.67.

fund taxes.

The local newspaper, the "Missoulian", printed an article about the MAC's troubles about 11 months after it was put on the market. Both Coffman and Harold testified that the article was not helpful to MAC's business. Harold testified that MAC's performance was slowly improving until the Missoulian article, and still shows a small increase. On cross examination Harold testified that gross revenues for 2004 were stable and not much of a change from 2003.

On October 13, 2004, Lambros sales associate Katie Van Dorn ("Van Dorn") wrote to Dennisons about her clients' offer of $2,200,000 for the MAC, made September 2, 2004. Ex. U. In Ex. U, Van Dorn criticizes the Dennisons' listing price and asserts that even at her clients' offer of $2.2 million they would lose money on the MAC and that "the business does not make sense". Neither Van Dorn nor her clients, identified only as accountants, were called to testify. Dennisons counteroffered to Van Dorn for $4.2 million, according to Coffman.

Coffman and Harold each criticized both Van Doren's and her clients' analysis in Ex. U. Coffman testified that Van Doren is not qualified to perform the cash flow analysis in Ex. U, and that her clients were not objective in their analysis. When Coffman requested their analysis, he testified Van Doren's clients became upset.

Coffman is a licensed real estate broker in Montana, with 22 years experience in Missoula real estate, including businesses[5]. He was employed by the estate on March 15, 2005, to market the MAC, replacing their prior realtor from Lambros, Bill McQuirk. The application to employ Coffman provides for a commission of 6% of the sales price.

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[5]On cross examination Coffman testified that health clubs are no different than businesses, which use their cash flow to pay their bills.

The $4 million current listing price is set forth at Ex. X, a one year listing agreement with Lambros dated March 5, 2005. Coffman testified that the new asking price of $4,000,000 was arrived at utilizing his cash flow analysis, which was admitted as Ex. 1. Coffman testified in detail about his methodology in arriving at the $4 million listing price. Harold testified that he gave Coffman MAC's accurate and actual financial information of MAC's performance for the first 11 months of 2004, because that was all he had at the time. The Court notes that several, though not all, of the entries for income and expenses on Ex. 1 coincide with the MAC's profit and loss statement attached as the last few pages of Ex. O, DIP's supplement to Disclosure Statement[6]. Harold testified that Harlinda's financial figures are accurate and done as they should be in accordance with Generally Accepted Accounting Principles ("GAAP").

Harold refused on cross examination to admit that Harlinda did not have enough revenue to pay expenses and make regular payments to Amresco. He testified that MAC was paying each month its suppliers and other operating expenses in addition to Amresco, $1,000 to Beneficial Finance, his and Linda's draw, and that MAC has paid for ongoing upgrades to its equipment and building.

On Ex. 1 Coffman adjusted MAC's 11-month cash flow for the MAC to 12 months for gross revenues of $1,217,179. Then, Coffman first deducted operating expenses, adjusted depreciation and interest[7], arriving at a net profit before taxes of $379,450. From that Coffman

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[6]For example, the total income for Jan-Nov 04 on the profit and loss attached to Ex. O is $1,115,747.80, which corresponds to the actual gross revenue on Ex. 1. Entries for depreciation, interest, insurance, utilities, taxes, and other expenses exactly correspond, albeit not in as much detail on Ex. 1 as on the profit and loss statement

[7]Coffman testified he was told to use an interest rate of six and one-half to six and three-quarter percent.

deducted out another $50,000 which he estimated as a reasonable owner's earnings, leaving $329,000 available to pay off debt, or about 30% of the gross, from which he derived the $4 million listing price. Harold testified that he agrees with Coffman's current $4 million listing price as a realistic value for the MAC, but Harold believes Harlinda's 2004 cash flow on Ex. 1 should be $387,000.

Coffman testified that there are several formulas to use in valuing a business, including capitalization rate, but that he did not apply a capitalization rate in this instance because his cash flow analysis establishes how much money is actually available to pay for a loan. Coffman assumed a 20 year term for debt service, and he testified that the value of the real estate alone was $3.5 million, a value also placed on Amresco's Proofs of Claim, Ex. P and Q.

Under cross examination Coffman testified that the listing price for the MAC dropped initially from $5.2 million to $4.2 million, and then to the listing price he established at $4 million. Harold testified about offers he has received and rejected, including the verbal offers of $2.2 million from Van Doren later increased to $3 million after DIP changed their listing price to $4.2 million, and a $3.7 million verbal offer from a developer in San Antonio.

Coffman further admitted that his 6% commission on a sale price of $4 million would total $240,000, and reduce the proceeds available to pay creditors to $3,760,000. Ex. X provides for a reduced commission of 4%, however, if Edwen Miller or assigns purchase the property. Harold admitted that DIP's secured debt totals almost $3,700,000[8], if the claims are allowed as filed.

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[8]Harlinda's claims register summary, Ex. S – p. 3, lists $3,646,499.10 in secured claims and $3,892,494.41 in total claims.

Coffman testified that confirmation of the DIP's Plan is very important to the prospects of a sale of the MAC. His marketing efforts include advertisements on the internet, and in publications as far as Los Angeles. He testified that he has only a 1 year listing, and that in his opinion the MAC can sell for $4 million within that time. Coffman said he did not care about the 17 month period the MAC has been on the market, so long as his analysis in Ex. 1 is correct and he does his job.

Balis testified he reviewed Ex. 1 and does not believe that MAC's cash flow supports a $4 million sale price. Amresco did not submit a written appraisal of the MAC, but Balis opined that the MAC would be difficult to sell as a health club for $4 million because the property's value is primarily as real estate, not as a health club. Balis did not believe the MAC is worth $4 million and should be listed lower at between $3.6 to $3.7 million, but he admitted under cross examination that the MAC's real estate value alone is sufficient to pay Amresco's claim in full. Balis also testified that he is familiar with real estate values in Missoula, and that Missoula real estate values have gone up more than in Boise, Idaho, where he lives. Balis did not believe any buyer of health clubs would want to spend $3.6 million or more on real estate, and that the eventual buyers of the MAC would actually remove its assets to use the real estate for another purpose.

Balis testified that a bank would finance the purchase only of a portion of the real estate value, and that debt service on a $3.5 million loan at 7% over 20 years is $330,000 per year, which he claimed is all the revenue Coffman identified as available to service debt from Ex. 1. Balis testified that the 7% interest rate on a straight bank loan would be available only with a personal guarantee, and because of the bankruptcy a higher rate, he did not specify, would be

required.

Harold testified that, at present, the MAC is cash flowing and has paid Amresco interest at the contract rate during the pendency of these cases. He testified that he will be able to pay interest during the marketing period in the Plan, and that he has paid Amresco adequate protection payments of $15,973.62[9] since February 2005. Real property taxes for the first half of 2005 will total between $17,000 to $18,000, Harold testified, and he could pay them now but stated it would be tight. He testified he is current on his post-petition payroll tax liability.

Balis testified that Amresco is concerned about the 3 year plan term because he does not believe the MAC can be sold for the $4 million listing price, and he does not know what will happen if there is no sale. Although the Plan's stated term for marketing the MAC is 3 years, Harold testified that he is confident the MAC will sell before then, and that the Debtors will not wait 3 years to sell it.

DISCUSSION

The ballot report reflects and the Court finds that Class 3.4 accepted DIP's Plan in the amount of $140,000 based upon the stipulation with Yeadon. The Court also found Class 5.1 accepts by virtue of Yeadon's ballot accepting the Plan in the sum of $30,816.90, while American Express rejects in the amount of $596.87. Amresco, by virtue of its objection, is deemed to have rejected the Plan in Class 3.1. Class 5.2 rejects. Thus, the Court finds and concludes that at least one class of impaired claims has accepted the plan in satisfaction of 11 U.S.C. § 1129(a)(10).

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[9]The profit and loss statement attached to Ex. O shows mortgage interest paid in November 2004 of $15,976.53 and annual interest of $190,102.83.

I. Contentions of the Parties.

Amresco objects to confirmation on several grounds. Amresco argues that the Plan is not feasible because the DIP cannot make the monthly payments, and the value of the MAC is insufficient to pay the secured creditors, post-petition real estate taxes and administrative claims. Amresco argues that the Plan is not fair and equitable because the interest rate provided for Amresco's claim is too low, and the 3 year term to sell the MAC is too long. Amresco objects that the Plan is not filed in good faith because it allows Debtors to draw salaries for 3 years while waiting for a sale, and that the Plan pays personal debts of the Dennisons. Amresco argues the Plan is vague and needs to be clarified to provide for post-petition interest to secured creditors on their claims, for payment of post-petition taxes and adequate protection payments to Amresco. Amresco requests denial of confirmation and conversion of these cases to Chapter 7.

Debtors seek confirmation of their amended Plan of Liquidation. They contend that the MAC will sell within 3 years at a price sufficient to repay their secured creditors in full, particularly after contemplated litigation of Amresco's and Missoula County's secured claims.

II. Feasibility.

The DIP have the burden of proof to satisfy all of the confirmation requirements under 11 U.S.C. § 1129. *In re Mont-Mill Operating Company*, 16 Mont. B.R. 61, 64 (Bankr. D. Mont. 1997); *In re Prudential Energy*, 58 B.R. 857, 862 (Bankr. S.D. N.Y. 1986). Regardless of any objection, the Court has a responsibility and duty to determine whether the requirements of § 1129(a) have been met. *Mont-Mill*, 16 Mont. B.R. at 63, *quoting In re Rocky Mountain Equip. Co., Inc.*, 76 B.R. 230, 238, 76 B.R. 784, 789-90 (Bankr. D. Mont. 1987).

The feasibility requirement is set forth at 11 U.S.C. § 1129(a)(11), which requires that a

court confirm a plan only if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." *In re Brotby*, 303 B.R. 177, 191 (9th Cir. BAP 2003). To demonstrate that a plan is feasible a debtor need only show a reasonable probability of success. *In re Brotby*, 303 B.R. at 191; *In re Acequia, Inc.*, 787 F.2d 1352, 1364 (9th Cir. 1984). *Brotby* notes that the Code does not require the debtor to prove that success is inevitable, *In re WCI Cable, Inc.*, 282 B.R. 457, 486 (Bankr.D.Or.2002), and a relatively low threshold of proof will satisfy § 1129(a)(11), *In re Sagewood Manor Assocs. Ltd.*, 223 B.R. 756, 762 (Bankr.D.Nev.1998), so long as adequate evidence supports a finding of feasibility. *In re Brotby*, 303 B.R. at 191-92; *In re Pizza of Hawaii, Inc.*, 761 F.2d 1374, 1382 (9th Cir. 1985). The Court cannot confirm plans that are purely "visionary". *In re Scenic Valley Ranch, Inc.*, 20 Mont. B.R. 1, 6 (Bankr. D. Mont. 2002), citing *In re Pizza of Hawaii, Inc.*

In the instant case the Plan is a liquidating plan, which is specifically provided for under § 1129(a)(10). While the Debtors have the burden of proof under § 1129, the Court notes that the relatively low threshold of proof to satisfy § 1129(a)(11) is even more easily met where the plan itself calls for liquidation rather than reorganization which would require a reasonable assurance of commercial viability. *Mont-Mill*, 16 Mont. B.R. at 64, *quoting In re Rocky Mountain Equip. Co., Inc.*; *In re Clarkson*, 767 F.2d 417, 420 (8th Cir. 1985). "The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts." *Id.* In the instant case the DIP have employed competent professionals to market the MAC.

Balis admits the real estate value of the MAC real property alone is sufficient to pay its claim in full. That admission is buttressed by Harold's testimony that MAC's equipment which

also comprises Amresco's security has a value of $642,000. Balis does not believe that the MAC property is worth the $4 million listing price, but Amresco failed to offer expert appraisal testimony in support of its objections either to the value of the real property or MAC's equipment. "Feasibility is established through the testimony of experts". *Mont-Mill*, 16 Mont. B.R. at 65, *quoting* 7 *Collier on Bankruptcy*, ¶ 1129.03[11], p. 1129-64 (15th ed.). A debtor's estimate of value may be acceptable in certain cases, while the Court's discretion includes the weight to be accorded to the evidence. *In re Hungerford*, 19 Mont. B.R. 103, 118-119 (Bankr. D. Mont. 2001), citing 4 Joseph M. McLaughlin, *Weinstein's Federal Evidence*, § 702.05[2][a] (2nd ed. 2000). Harold is a debtor, and his opinion testimony that the MAC had the listed market value of $4 million was corroborated by Coffman, who is a qualified real estate professional with an incentive to market the property at maximum value to realize his commission. Amresco offered no expert appraisal testimony of the value of the MAC or MAC's equipment, only Balis's own opinion to which the Court gives no probative weight. Amresco objects that DIP have not shown they can make their payments to Amresco and other creditors, but the evidence shows that the DIP are current on their post-petition payments to Amresco, and Balis did not testify otherwise.

Further, Amresco's objection states that the value of MAC is only around $3,000,000, which contradicts its own Proofs of Claim and evidence, Ex. P and Q, and Balis's testimony. Balis admitted that the MAC's real property should be listed for between $3.6 million to $3.7 million, which he admitted would be sufficient to pay Amresco's secured claim in full. The DIP's Plan's feasibility of paying Amresco in full would only be increased if their contemplated

objection to Amresco's claim succeeds[10] or MAC's equipment value is realized. The Court finds and concludes that adequate evidence supports a finding of feasibility. *In re Brotby*, 303 B.R. at 191-92; *In re Pizza of Hawaii, Inc.*, 761 F.2d at 1382.

III. Fair and Equitable – § 1129(b)(2)(A)(i).

Amresco objects that the Plan is not fair and equitable because the interest rate is too low, the 3 year period is too long in light of the exposure to the market, and senior property tax liens remain unpaid. The latter objection is undermined by Balis's admission under cross examination testimony that the real estate value of the MAC alone is worth enough to pay Amresco's claim in full. The senior liens of the Internal Revenue Service and Missoula County, which did not file objections to confirmation, are provided like Amresco's for payment in full with interest.

A secured creditor's treatment under the plan will be classified as fair and equitable requires the plan to provide with respect to secured claims:

> (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's

[10]The Court ventures no opinion on the merits of Debtors' contemplated objection to Amresco's claim, except to note that Amresco's own evidence shows a reduction of its claim from $3,115,527.19 on Ex. J, to $3,078,421.14 on its first Proof of Claim (Ex. P), and then to $3,070,980.86 on its amended Proof of Claim (Ex. Q). Further, Ex. J shows that Amresco's claim includes more than $1 million in "Make Whole Premium" and "Credit Enhancement Amount" in addition to principal, although the latter appears to have been included on Ex. Q as principal.

interest in such property.

In re Boulders on the River, 164 B.R. 99, 105 (9th Cir. BAP 1994).

The DIP's amended Plan, Ex. M, at page 3, Article III provides that all Class 3 secured claims will retain their liens until paid in full, as a result of which the first prong of § 1129(b)(2)(A)(i)(I) has been satisfied. *Id.*

The interest rate is more problematic. Amresco objects that it is too low at 6% per annum and the term is too long. The BAP in *Boulders on the River*, 164 B.R. at 105, noted that the Ninth Circuit applies the "formula rate" approach for determining the interest payable on the deferred payment of an obligation under the cramdown. *See also In re Fowler*, 903 F.2d 694, 697 (9th Cir. 1990); *In re Camino Real*, 818 F.2d 1503, 1508 (9th Cir. 1987); *Tax Collector v. Pluma (In re Pluma)*, 303 BR 444, 447-48 (9th Cir. BAP 2003) (Chapter 13).

Under the formula rate approach the court starts with a base rate and adds a risk factor based on the risk of default and the nature of the security. *Boulders on the River*, 164 B.R. at 105; *In re Fowler*, 903 F.2d at 697; *In re Pluma*, 303 BR at 448; *see also Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S.Ct. 1951, 1961-62, 158 L.Ed.2d 787 (2004) (Chapter 13 cramdown – after hearing adjust prime rate to account for the greater nonpayment risk that bankrupt debtors typically pose, depending on such factors as the circumstances of the estate, the nature of security, and the duration and feasibility of the reorganization). The interest rate determination is to be made on a case-by-case basis. *Boulders on the River*, 164 B.R. at 105; *In re Camino Real*, 818 F.2d at 1508; *In re Pluma*, 303 BR at 447.

A contract rate of interest may be evidence of the proper rate for a plan, but it is not conclusive. *See Hungerford*, 19 Mont. B.R. at 112 (citing cases); *see also Till v. SCS Credit*

Corp., 541 U.S. 465, 124 S.Ct. 1951, 1963-64, 158 L.Ed.2d 787 (Chapter 13 – rejecting contract rate approach). Ex. A defines the note's interest rate at 9.5% as of 1999, to which this Court gives no probative weight because of the remoteness from the date of confirmation. DIP's amended Plan provides for interest to Amresco and other secured creditors of 6% per annum. DIP's offered no evidence of a base rate or risk factor. On the other hand Balis's testimony did not support Ex. A's 9.5% rate. Balis testified that a bank loan to finance or refinance over 20 years would have an interest rate of 7%, and the bankruptcy would add a risk factor which he did not specify.

Both parties' evidence on interest rate leaves much to be desired. Nevertheless, considering the risk of default and the nature of the security as required by *Boulders on the River*, 164 B.R. at 105, the Court finds that DIP have satisfied their burden of proof under 1129(b)(2)(A)(i)(II) that the 6% interest rate for Amresco is fair and equitable, if only by a slight preponderance of the evidence based upon the particular factors of this case. No other creditor objected to the 6% interest rate. Balis's quoted 7% interest rate is based upon a 20 year term, to which DIP's 3 year maximum plan term compares favorably and is short, notwithstanding Amresco's objection that 3 years for full payment is too long. The risk of default is low because the Plan provides for the sale of the MAC, not deferred payments stretching out beyond 3 years. Underlying this is the nature of the security, a highly valuable piece of real estate at a desirable location in a thriving real estate market which Amresco's own witness admitted has sufficient inherent value to pay its claim in full.

Based upon the secured creditors' retention of their liens, the 6% interest rate for the limited 3-year term and the value of Amresco's real property and personal property security, the

Court finds and concludes that DIP's amended Plan is fair and equitable and satisfies the requirements of § 1129(b)(2)(A)(i). *Boulders on the River*, 164 B.R. at 105.

IV. Good Faith – § 1129(a)(3).

Amresco contends that Plan is not filed in good faith because it allows Dennisons to draw salaries for 3 years while waiting for a sale that will never happen, and that the Plan pays Dennisons' personal debts. Section 1129(a)(3) states that the bankruptcy court shall confirm a plan if the plan has been proposed in good faith and not by any means forbidden by law. *Boulders on the River*, 164 B.R. at 103. Good faith is assessed by the Court viewed under the totality of the circumstances. *Boulders on the River*, 164 B.R. at 104. The good faith that is required to confirm a plan requires the plan to achieve a result consistent with the objectives and purposes of the Bankruptcy Code. *In re Boulders on the River*, 164 B.R. at 104; *In re Mann Farms Inc.*, 917 F.2d 1210, 1214 (9th Cir.1990); *In re Corey*, 892 F.2d 829, 835 (9th Cir.1989), *cert. denied*, 498 U.S. 815, 111 S.Ct. 56, 112 L.Ed.2d 31 (1990). In the instant case the DIP's amended Plan provides for orderly marketing and sale of the MAC and payment of their secured creditors in full, with interest, which this Court deems consistent with the objectives and purposes of the Bankruptcy Code.

The evidence shows that Dennisons take their monthly draw of $6,000, and that they paid an ongoing life insurance policy premium to Philadelphia Insurance Company related to the operation of the MAC, and paid certain personal credit card debt. However, Harold testified that the credit card debt and insurance premium were related to the business operation of the MAC. Amresco offered no evidence to the contrary. Having observed Harold's demeanor while testifying under oath and cross examination, the Court finds that Harold is a credible witness. *In*

re Taylor, 514 F.2d 1370, 1373-74 (9th Cir. 1975); *see also Casey v. Kasal*, 223 B.R. 879, 886 (E.D. Pa. 1998).

The Stipulation between Amresco and the DIP filed and approved by the Court on August 16, 2005, provided that Harlinda is entitled to operate in the ordinary course of business, including paying payroll. The only evidence in the record is that Harold and Linda took their $6,000 monthly draw for working at the MAC. No other purpose for the $6,000 is shown in the record. Amresco argues that the DIP have failed to make their adequate protection payments, but Harold testified Debtors are current in post-petition adequate protection payments under the approved Stipulation, and the amended Plan, Ex. M, provides that interest payments shall continue to be made to Amresco. Amresco offered no evidence to the contrary. Viewed under the totality of the circumstances, the Court finds that the DIP have satisfied their requirement to show the Plan is proposed in good faith under § 1129(a)(3).

V. Creditor's Request to "Clarify" Plan.

Amresco asks that the Plan be clarified in the event the MAC does not sell within the 3 year plan term to provide for payment of taxes, interest, adequate protection payments, and for a remedy if the Debtors breach their obligations under the Plan. However, it is not the Court's task to draft or clarify plan language.

A confirmed plan binds the debtor, creditors and other parties. 11 U.S.C. § 1141. In addition, post-confirmation there would no longer be a bankruptcy estate because property of the estate vests in the reorganized debtor upon confirmation under § 1141(b). *In re Eastland Partners Ltd. Partnership,* 199 B.R. 917, 920-21 (Bankr. E.D. Mich. 1996). The Plan, Ex. M, at pp. 4-5 contains a limited retention of jurisdiction for this Court to hear and determine claims and

ensure that the purpose and intent of the Plan are carried out, but only until the case is closed. Nothing in Ex. M provides for an exception to § 1141(b)'s vesting of all property of the estate in the Debtors upon confirmation. Thus, after confirmation, breach of the payment provisions or failure to sell within the term of the confirmed plan would no longer be under the jurisdiction of this Court and Amresco could seek relief under applicable nonbankruptcy law in an appropriate forum. *In re Eastland Partners Ltd. Partnership,* 199 B.R. at 920-22. *See also, In re Timber Tracts, Inc.*, 70 B.R. 773, 778 (Bankr. D. Mont. 1987); *In re Ernst*, 45 B.R. 700, 702-03 (Bankr. D. Minn. 1985).

CONCLUSIONS OF LAW

1. This Court has jurisdiction over these jointly administered Chapter 11 cases under 11 U.S.C. § 1334(a).

2. Confirmation of DIP's Chapter 11 Plan is a core proceeding under 28 U.S.C. § 157(b)(2)(L).

3. The DIP satisfied their burden of showing satisfaction of all requirements for confirmation under 11 U.S.C. § 1129(a) and (b) by a preponderance of the evidence, including that the Plan is filed in good faith, is feasible, and is fair and equitable with respect to Amresco's secured claim.

IT IS ORDERED a separate Order shall be entered in conformity with the above overruling Amresco's objection to confirmation, and confirming the DIP's Amended Chapter 11

Plan of Liquidation, filed January 26, 2005.

BY THE COURT

Ralph B. Kirscher

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana